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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 761

MELVIN C. JENKINS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia is reported at —— U.S. App. D.C. ——, 330 F. 2d 220 (R. 53).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 13, 1964 (R. 53, 60), and a petition for rehearing en banc was denied on April 3, 1964 (R. 61). On May 6, 1964, by order of Chief

Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including June 2, 1964 (R. 62). On June 2, 1964, by order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including June 3, 1964 (R. 62). The petition for writ of certiorari was filed on June 3, 1964, and was granted on December 14, 1964 (R. 63). The jurisdiction of this Court rests on 28 U.S.C. 1254.

Constitutional Provisions and Statutes Involved

Amendments to the Constitution of the United States:

Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes:

D.C. Code, Section 22-501 (1961 Edition) *Assault with intent to kill, rob, rape, or poison:*

"Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years. (Mar. 3, 1901, Stat. 1231, ch. 854, section 803)"

D.C. Code, Section 22-2901 (1961 Edition) *Robbery:*

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, section 810)"

Rule 31. Federal Rules of Criminal Procedure:

"(a) *Return.* The verdict shall be unanimous. * * *"

Questions Presented

1. Whether the rule of *Allen* v. *United States*, 164 U.S. 492, is constitutional under the Fifth and Sixth Amendments to the Constitution of the United States.

2. Whether the United States Court of Appeals for the District of Columbia correctly applied the rule of *Allen* v. *United States*, 164 U.S. 492, in this case.

Statement

Petitioner was indicted in the United States District Court for the District of Columbia on two counts: (1) robbery, in violation of 22 D.C. Code, Sec. 2901, and (2) assault with intent to commit robbery, in violation of 22 D.C. Code, Sec. 501 (R. 54). After trial by jury, petitioner was found guilty, under count one of the indictment, of robbing a High's Dairy, located in Washington, D.C., of $38.00 (R. 54). After judgment of conviction was entered, petitioner was sentenced to imprisonment for a period of three to ten years (R. 54).[1]

The Court of Appeals affirmed the judgment of conviction of February 13, 1964, Judge Skelly Wright dissenting (R. 60). A petition for rehearing en banc was filed and denied by that Court on April , 1964, Judges Bazelon, Fahy, Washington and Wright in favor of granting the petition (R. 61).

At the conclusion of the trial on May 27, 1964, the jury began deliberating at 2:22 p.m. and was recalled to the courtroom at 4:30 p.m. after sending a note to the trial judge which read as follows (R. 48):

> The jury cannot come to a decision on both counts because of insufficient evidence.

The trial judge then gave a supplemental instruction to the jury, as follows (R. 48-49):

> Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

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[1] Petitioner is presently serving the above-mentioned sentence at Lorton Reformatory, Lorton, Virginia.

Now, I am not going to accept this. You have got to reach a decision in this case.

You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has got to be decided. That is all the evidence there is, that is all the evidence anybody can have. If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

The following day, at 11:00 a.m., the trial judge called counsel to the bench and informed them that the jury requested the testimony of one of the witnesses (R. 50, 51). The jury was brought back into the courtroom, at which time the testimony of the witness was read to them by the court reporter. They again retired to the jury room and at 2:20 p.m., the jury rendered the verdict mentioned above (R. 51, 52).

ARGUMENT

I.

The Rule of Allen v. United States, 164 U.S. 492, Is Unconstitutional Under the Fifth and Sixth Amendments to the Constitution of the United States.

The Fifth and Sixth Amendments guarantee every person charged with an indictable crime the right of due process of law and trial by a fair and impartial jury. Implicit in these guarantees is the right of an individual defendant to have a jury disagree.[2] The Allen charge infringes upon this right as its very purpose is to facilitate agreement among jurors. *Green* v. *United States*, 309 F. 2d 852, 854 (C.A. 5, 1962); *Campbell* v. *United States*, 115 U.S. App. D.C. 30, 316 F. 2d 681, fn. 1. It is based on a fallacious legal principle that some jury at some time should convict or acquit. Thus, the Allen charge is in direct conflict with an individual's fundamental constitutional guaranties.

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[2] See: Federal Rules of Criminal Procedure, 28 U.S.C., Rule 31(a) "*Return.* The verdict shall be unanimous. * * * " See also: *Andres* v. *United States*, 333 U.S. 740.

In *Allen* v. *United States*, 164 U.S. 492, this Court sustained a long established practice[3] and laid down the following guidelines for a supplemental charge to be given to a deadlocked jury (164 U.S. at 501):

> * * * that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. * * *

Certainly the purpose behind the Allen charge is an advantage to both sides as it saves the time and expense of numerous trials. However, this is a legitimate or proper purpose only if the change in the minority jurors' opinion is due to a reasoned change in their views of the evidence. But, despite the good intentions behind the Allen charge, the great danger with it is that the effect it has on the jury cannot be ascertained. And, since it is always directed to the minority, it may cause the minority jurors to substitute

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[3] Cf. *Commonwealth* v. *Tuey*, 62 Mass. (8 Cush.) 1 (1851); *Allis* v. *United States*, 155 U.S. 117.

the view of the majority for their own. If this is done, of course, the verdict is improper and violates the defendant's constitutional rights because the jury has not reached a unanimous verdict but only a majority verdict. Experience has established that even if the Allen charge has served its avowed purpose of saving the time and expense of new trials, the decision has resulted in the erosion of individual constitutional rights of defendants due to its very nature of coercion. That this is true is perhaps best shown by considering decisions of the lower courts which have had occasion to consider, criticise and limit equivalent charges.[4]

The Federal courts, while duty bound to uphold the Allen charge, have shown this apprehension of it by reversing convictions where the supplemental instructions varied, even in the slightest, from it. For example, in *Green* v. *United States*, the Court held that a charge containing the statement that "the majority will have better judgment than the mere minority" far exceeded "the permissible limits of the Allen charge" (309 F. 2d at 855). The Court pointed out that there is no legal rule that the majority should distrust their judgment and that such a charge leads the minority to believe that they should accede to the majority for no other reason than that. This, the Court said, disregards the historical rule that a single juror has a right to stick to his conscientious opinions.

Likewise, in *Rogers* v. *United States*, 289 F. 2d 433 (C.A. 4, 1961), a conviction was reversed because the trial judge gave an Allen-type charge but failed to include the ameliorating admonition that no juror could yield his conscientious conviction. The Fourth Circuit stated that the Allen

[4] See: "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'," U. Chi. Law Rev. *31*:386 (1964); and "Instructions by Trial Court Coercing Agreement Among Jurors," Tulane Law Rev. *34*:214 (1951).

charge, itself, "approaches the ultimate permissible limits" (289 F. 2d at 435). That same Court again reversed a conviction, in *United States* v. *Smith*, 303 F. 2d 341 (C.A. 4, 1962), where the ameliorating admonition was given, but after the statement that the minority should "swallow their views and attempt to agree with the majority" (303 F. 2d at 343). The Fourth Circuit reiterated that; "(u)naccented and unembellished, the Allen charge is quite bold enough" (303 F. 2d at 343).

And, in *Powell* v. *United States*, 297 F. 2d 318 (C.A. 5, 1961), a conviction was reversed because the trial judge embellished on the Allen charge with such phrases as "this jury is just as competent as the next jury"; "no credit will be due a juror who stands up in a spirit of pure stubbornness"; and, "this jury ought to be able to reach a verdict in this case." The Fifth Circuit found no authority for the trial court to go beyond the wording set forth in the *Allen* case. The Court felt that because the trial judge had done so, the jurors might have been induced to agree to a verdict by fear that a failure to do so would reflect upon their intelligence or integrity.

However, in *Huffman* v. *United States*, 297 F. 2d 754 (C.A. 5, 1962), *cert. denied*, 370 U.S. 955, decided approximately a year after *Powell*, the Court affirmed even though the trial judge embellished on the Allen charge. A comparison of the charges in the two cases shows that the embellishment in *Huffman* was far greater than in *Powell*.[5] The courts have not been consistent in their approach to

[5] The dissenting opinion in *Huffman* points out the manifest unfairness of the decision as compared to *Powell*. Judge Brown states that the only reason that reversal was not granted in *Huffman* was that no objection was made to the Allen charge, as was the case in *Powell*. Petitioner submits that, if *Allen* constitutes the constitutionally permissible limits, no failure to object can waive the violation of due process.

this problem. Indeed, Judge Brown, dissenting in *Huffman*, argued that the courts ought to, at least, attempt to be consistently fair.

Judge Brown went beyond pointing out that unfairness arises due to confusion between the decisions because of the necessity of applying the law to the facts in each case. He argued that the Allen charge is *per se* unfair and should no longer be used. His rationale as to why the charge in *Huffman* was erroneous is applicable here.

The dissent in *Huffman* points out that the charge was based upon a basic misapprehension that criminal cases must end with a verdict of guilty or not guilty; overlooked the fact that a jury's failure to agree is a momentary victory, at least, for the defense and an end to the trial; and, that once the charge is given the jury was no longer free but was influenced by the judge's statement that it was their duty as citizens and jurors to agree. Judge Brown states (297 F. 2d at 759):

> * * * There is no longer any place for the Allen charge. For good reason it has acquired its description as the "dynamite charge" (variously called the nitroglycerine charge) at the hands of the bar. * * * I think a mistrial from a hung jury is a safeguard to liberty.

In *Andrews* v. *United States*, 309 F. 2d 127 (C.A. 5, 1962), a further refinement was made. There, the question was whether the trial judge gave the Allen charge too quickly—one hour and five minutes after the jury had begun deliberations; the court upheld the conviction. Judge Wisdom's dissenting opinion declared that the Allen charge causes "more trouble than worth" (309 F. 2d at 129). The nature of the confusion that has arisen in this area is well shown by *Green* v. *United States*, 309 F. 2d 852 (C.A. 5, 1962). There, after *Andrews*, the trial judge had informed the jury

before retiring to render its verdict that the minority should listen to the majority and should view its opinion with some doubt. The Fifth Circuit, after deciding that the sole purpose of the Allen charge is to "blast loose a deadlocked jury" (309 F. 2d at 854) stated that "(t)here is small, if any, justification for its use and no justification for its coercive use" (309 F. 2d at 854).[6] The Constitutional guarantees of due process and a fair and impartial jury cannot be circumscribed by creating a new right of courts to "blast loose" a jury that has disagreed.

In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9, 1914), a conviction was reversed where the trial judge, in a supplemental instruction, placed too much emphasis on the cost of a trial (the case had been tried twice), and informed the jury that justice required the case to be brought to an end. The Court of Appeals said that the language used "is plainly coercive in its general spirit and tendency" (213 Fed. at 924).

State courts have also wrestled with the question whether the Allen charge—or similar language—is coercive on its face. And few States have found such charges totally wanting.

In *State* v. *Thomas*, 86 Ariz. 161, 342 P. 2d 197, the Supreme Court of Arizona considered language almost identical to that in *Allen* and a problem identical to the one now before this Court, and said (342 P. 2d at 200):[7]

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[6] In *United States* v. *Kahaner*, 317 F. 2d 459 (C.A. 2, 1963), *cert. denied*, 375 U.S. 836, 926, that Circuit recognized its disagreement with the Fifth Circuit's application of the Allen charge. See fn. 18, 317 F. 2d 484. In *Kahaner*, a conviction was upheld after the Allen charge was given a second time at the request of the jury.

[7] See and compare: *State* v. *Evans*, 88 Ariz. 364, 356 P. 2d 1106, *cert. denied*, 371 U.S. 835.

> This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.
>
> It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with various facts and circumstances and welded with ever-changing personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security. We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.

The *Thomas* case overruled *State* v. *Voeckell*, 69 Ariz. 145, 210 P. 2d 972, where the Arizona Supreme Court permitted an Allen-type charge. The dissenting opinion of Justice Udall in the *Voeckell* case was impressive and undoubtedly influenced the later result in *Thomas*. He said (210 P. 2d at 978, 979):

> * * * Inasmuch, however, as it is a matter of first impression in this jurisdiction I strongly feel that the Court, at this crossroad, has taken the wrong path, and that the approval of its use now and in the future is a step backward rather than forward in the fair and impartial administration of justice.
>
> I agree with defense counsel that after hearing this instruction each minority juror no doubt reasoned thusly to himself:

"The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did not tell me to surrender my conscientious convictions, he told me to doubt *seriously* the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will have to change my vote."

* * * * *

In my opinion the giving of the instruction complained of unfairly tipped the scales of justice against this defendant as it had a highly coercive effect upon the jury. Furthermore I am convinced that if this instruction under similar circumstance comes into general use in the trial courts of this state it will more frequently than not result in miscarriages of justice.

The courts are ever alert to curb "third degree" methods by peace officers against those accused of crime, hence it becomes all the more necessary that the trial court itself refrain from any act, such as the giving of last minute "advice" that in Colorado at least has earned the sobriquet of "third degree instruction." The Supreme Court of Michigan in speaking of acts of jury coercion made the sage statement: "Every attempt to drive men into agreement which they would not have reached freely is a perversion of justice." *Pierce* v. *Pierce*, 38 Mich. 412.

And, in *Eikmeier* v. *Bennett*, 143 Kan. 888, 57 P. 2d 87, 92,[8] the Kansas Supreme Court said:

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[8] See annotation in 19 A.L.R. 2d 1257, 1258, " * * * the principles or considerations governing the propriety of verdict-urging instructions in civil cases appear to be essentially the same as they are with respect to criminal trials, the courts having rarely, if ever, suggested any considerations as clearly differentiating the two kinds of trials in this respect.".

> * * * To say to a minority that they should reexamine their views in the light of the opinion held by the majority, without putting a like duty on the majority * * * is wrong. The minority may be right and the majority wrong. Until the legislature provides for verdicts by definite majority of the jury, the court, by additional instruction, should not suggest, even faintly, that the opinion of the minority is to be controlled by that of the majority (57 P. 2d at 92).

Courts in other states while not wholly rejecting the Allen charge have treated it unkindly. In Colorado it is called the "third-degree instruction," *Leech* v. *People,* 112 Colo. 120, 146 P. 2d 346; in New Mexico, the "shot-gun instruction," *State* v. *Nelson,* 63 N. Mex. 428, 328 P. 2d 202. Further, the courts in Idaho, Iowa and Wisconsin have discouraged the use of the charge. *State* v. *Moon,* 20 Idaho 202, 117 P. 2d 757; *State* v. *Pierce,* 178 Iowa 417, 159 N.W. 1050; *Middlestate Utility Company* v. *Incorporated Telephone Company,* 222 Iowa 1275, 271 N.W. 180; *Hannon* v. *State,* 70 Wis. 448, 36 N.W. 1; *Hodges* v. *O'Brien,* 113 Wis. 97, 88 N.W. 901; *Secor* v. *State,* 118 Wis. 621, 95 N.W. 942; *Brown* v. *State,* 127 Wis. 193, 201, 106 N.W. 536, 539.

In *State* v. *Pierce, supra,* an otherwise properly given Allen-type charge brought about a reversal because the jury reacted too quickly to it. The Supreme Court of Iowa was concerned that the charge might have incorrectly influenced the jury. In reversing, the Court said (159 N.W. at 1055):

> The rule above stated shows on its face how difficult it is to apply it with safety to the rights of the parties. That it is the one which our holdings compel does not obviate its dangers. Therefore, though its wording is technically correct and has often been approved, it will

be better not to give it unless it be in an extreme case, and we suggest that where given it be in language less likely to have a coercive effect upon the mind of the average juror.

In *Counts* v. *Commonwealth,* 137 Va. 744, 119 S.E. 79, the Supreme Court of Virginia found that the trial court's statement to the jury that the minority should attempt to reconcile their views with the majority was coercive and reversed.

State v. *Fisher,* 23 Mont. 540, 59 Pac. 919, involved a reversal of a conviction on the ground that the trial judge, in his supplemental charge, said: "Feeling as I do about the case I see no reason for the jury to disagree and put the county to a large expense." See also: *Orr* v. *State,* 269 Ala. 696, 111 So. 2d 627; *Meadows* v. *State,* 182 Ala. 51, 62 So. 737; *Secor* v. *State, supra; McCarthy* v. *Odell,* 202 App. Div. 734, 195 N.Y.S. 80.

At the other extreme, one finds cases such as *Chase* v. *State,* —— Alaska ——, 369 P. 2d 997, where the Alaska Supreme Court upheld a conviction in a case where the Allen charge was given after the trial judge had determined that the jury was voting for conviction eleven to one. Compare *Burton* v. *United States,* 196 U.S. 283; *Brasfield* v. *United States,* 272 U.S. 448, where the identical practice was condemned.

When an opinion of this Court permits confusion such as this, justice is not being served. That the courts, both state and federal, have been concerned with whether an Allen-type instruction causes a juror to give up his belief to that of the majority solely for the purpose of reaching an agreement, is made obvious by reading the foregoing cases. A slight change of language, a slight difference in the time the charge was given, or a combination of slight

changes of both, have all caused errors requiring reversal. Even in this Court there has been difficulty with the Allen charge; in *Burton* v. *United States, supra,* and in *Brasfield* v. *United States, supra.*

The disrepute in which the Allen charge has come to be held can be seen in its popular designation as the "dynamite charge." Perhaps this is due in part to the fact that the charge is given for the purpose of expediency. It is respectfully urged that the time has come for this Court to reassess the rule of *Allen* v. *United States* for the purpose of determining whether its coercive effect is not in derogation of the constitutional rights and protections provided in the Fifth and Sixth Amendments. The rationale as to why the very purpose of the Allen charge is contrary to constitutional rights and is *per se* coercive and improper was set forth by Judge Brown in his dissent in *Huffman* v. *United States, supra,* as follows, and appears to best express the body of judicial thinking in this area:

> In the final analysis the Allen charge does not make sense. All it may rightfully say is that there is a duty to accept the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to decide, it is legally incorrect and an interference with that rightful independence.
>
> The time has come I think to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great (297 F. 2d at 759).

II.

The United States Court of Appeals for the District of Columbia Incorrectly Applied the Rule of Allen v. United States, 164 U.S. 492, in This Case.

The decision of the United States Court of Appeals for the District of Columbia in this case is an interpretation of *Allen* v. *United States,* 164 U.S. 492, and is not in accordance with the rule of that case or in concord with the interpretations of that rule as enunciated by other Circuits.

In the instant case, the jury deliberated for approximately two hours when it returned to the courtroom and informed the trial judge that it could not agree on either count because of "insufficient evidence" (R. 48). The trial judge then gave the jury what amounted to a supplemental charge which only could have had the effect of intimidating and coercing the jury into agreement. The judge's remarks, in pertinent part, are:

> Well, you have all the evidence there is, all the evidence anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.
>
> Now, I am not going to accept this. *You have got to reach a decision in this case.* * * *
>
> Of course, every case involves a problem and *you have got to weigh the evidence and reach a conclusion.* That is what jurors are for. * * *
>
> *It is a simple case.* We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.
>
> I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock to-

> morrow morning and then resume your deliberations *because this case has to be decided.* That is all the evidence there is, that is all the evidence anybody can have. *If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible would it.* * * * (R. 48, 49).[9] (Emphasis added.)

The rationale of the *Allen* case is that jurors of the minority view should give consideration to the majority view. However, in *Allen,* this Court carefully added the proviso:

> if they (the minority jurors) can conscientiously do so.

In this case, the trial judge completely left out the ameliorating statement to the effect that minority jurors should consider the majority view *if they can conscientiously do so.* This is contrary to *Allen* and for this reason alone the decision below should be reversed. In *Rogers* v. *United States,* 289 F. 2d 433 (C.A. 4, 1961), a conviction was reversed because the trial judge, in giving the Allen charge, failed to inform the jurors that they had the right to hold on to their conscientious convictions. In that case, the Court said that the Allen charge is dependent upon the

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[9] In considering the above remarks, the United States Court of Appeals for the District of Columbia held that they did not require reversal. That Court went on to state, in a footnote, that the above statements did not purport to be a charge under *Allen* v. *United States, supra,* but only a judge's response to a jury which reported it was "deadlocked" after a brief deliberation. But, the Court of Appeals was obviously in error when it said the charge was not made under the authority of *Allen* v. *United States,* as there is no other authority for such a charge. From this, it is crystal clear that the decision rendered by the United States Court of Appeals for the District of Columbia in this case was based on an interpretation of the *Allen* case, and must be considered in the light of the *Allen* case.

moderating reminder to the individual jurors of their own responsibility to retain their views if they could not in good faith go along with the majority. The Court reversed solely because of the one-sidedness of the charge.

But, the trial judge in this case went much further than what has already been stated. Here, he ridiculed the jury by stating that they wouldn't be necessary unless there was a problem. The obvious inference is that men of good intelligence could solve such a problem. This was emphasized by the trial judge's later statement that it is a simple case. He even embellished on this by saying, "We have had cases that are much harder than this one that juries decide. As I say, if cases were open and shut, we wouldn't need any juries." As if his point wasn't made, he then further stated to the jury, "If I excuse you we will have to try the case again with some other jury and they will have the same evidence. Now, that would not be very sensible would it." In *Powell* v. *United States, supra*, the trial court was reversed for using the following language in its Allen charge:

> Some jury will have to pass upon this case and you twelve men are just as competent as any other jury.
>
> No credit to a juror to stand out in a spirit of pure stubbornness.
>
> You ought to be able to reach a verdict in this case.

In finding no authority for the trial court to go beyond the wording of *Allen*, the Court of Appeals for the Fifth Circuit held that no juror should be induced to agree to a verdict by a fear that a failure to do so will reflect upon his intelligence or integrity.

Practically every word in every paragraph of the supplemental charge given here has been rightly condemned as shown above. Yet, the court below wrote it off as harmless—a mere response by the trial judge to a jury that reported that it was deadlocked.

But, this fact was not completely overlooked. Judge Wright, in the dissenting opinion filed below, said:

> The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen* charge, now condemned as "the dynamite charge," does not go so far in coercing the jury.

When the charge given in the instant case is compared with *Powell* and *Rogers*, and to the *Allen* case itself, there can be no question that it is far excessive. Clearly, the court below was in error and this case should be reversed on the grounds of the coerciveness of the supplemental charge that was given.

Conclusion

For the foregoing reasons, petitioner urges that the judgment below should be reversed and the case remanded with directions to a judgment of acquittal.

Respectfully submitted,

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